Supreme Court, U.S.
FILED

97-1937 MAY 8 - 1998

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No. _____

In The

# Supreme Court of the United States

October Term, 1997

CITY OF ATLANTIC CITY,

*Petitioner,*

v.

MILTON PEVNER,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## SUPPLEMENTAL APPENDIX

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*NOT FOR PUBLICATION*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 97-5405

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MILTON PEVNER

v.

CITY OF ATLANTIC CITY,

Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 93-CV-02295)
District Court Judge: The Honorable
Joseph H. Rodriguez

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Submitted Under Third Circuit LAR 34.1(a)
January 29, 1998

Before: SCIRICA, ROTH, AND RENDELL, *Circuit Judges*

(Opinion Filed: FEB 9 1998)

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MEMORANDUM OPINION OF THE COURT

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RENDELL, *Circuit Judge*:

This appeal requires us to determine whether the district court abused its discretion in denying a motion for new trial, granting a remittitur, and awarding pre-judgment interest to the plaintiff in a civil rights action brought pursuant to 42 U.S.C. § 1983. Because we find

that the lower court acted well within its discretionary function, we will affirm.

## I. FACTUAL BACKGROUND

In 1988, Appellee Dr. Milton Pevner ("Dr. Pevner") and his business associate, Frank McGrath ("Mr. McGrath"), purchased five properties in a residential district of Atlantic City, New Jersey, intending to rent the properties to vacationers in order to earn additional income. However, these plans were thwarted when, beginning in the spring of 1989 and continuing until June 1991, Appellant, the City of Atlantic City, New Jersey, ("Atlantic City" or "the City"), filed more than sixty criminal charges against Dr. Pevner and Mr. McGrath for violations of a local zoning ordinance ("Ordinance") that had been in effect since 1980. That Ordinance prohibited more than three persons unrelated by blood from living together in a single home in certain residential districts. The City contended, *inter alia*, that four or more unrelated persons had been occupying one of the properties owned by Dr. Pevner and Mr. McGrath at various times between 1989 and 1990. Dr. Pevner and Mr. McGrath denied the allegations and pled not guilty to the City's charges.

Three days of hearings on the accusations were conducted in municipal court between October 1990 and February 1991, and on February 15, 1991, the court found Dr. Pevner and Mr. McGrath guilty on all charges, sentencing them to probation and ordering them to pay fines totaling $3,100.

Dr. Pevner and Mr. McGrath appealed to the Superior Court of New Jersey, Criminal Division, and by Order

dated June 7, 1991, the Superior Court reversed their convictions and declared certain provisions of the 1980 Ordinance unconstitutional. The court found that "there was insufficient, credible admissible evidence" to sustain the guilty verdicts, and it held that the Ordinance itself violated substantive due process under the Fourteenth Amendment and the New Jersey Constitution by placing unreasonable restrictions on the right to use and rent real property. The City did not appeal or request reconsideration of this ruling.

Subsequently, on May 27, 1993, Dr. Pevner and Mr. McGrath filed the instant action under § 1983 against Atlantic City, alleging that the City's efforts to convict them under the invalid zoning statute violated the United States and New Jersey constitutions and caused them severe emotional and psychiatric distress.[1] The district court granted Dr. Pevner's motion for summary judgment by Order dated December 29, 1994, and a jury trial for damages was conducted between March 18 and March 21, 1996. After a single day of deliberations, the jury returned a verdict of $1,238,788.50 in favor of Dr. Pevner. On April 4, the City filed a motion for new trial, or in the alternative, for remittitur of the jury's verdict, and on May 12, 1997, the district court granted the motion in part, and reduced the jury's award to $863,130, an amount which Dr. Pevner later agreed to accept. Finally, in a Letter Opinion dated May 30, 1997, the district court granted Dr. Pevner's motion for prejudgment interest pursuant to 28

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[1] Mr. McGrath assigned his interest in the § 1983 litigation to Dr. Pevner shortly before passing away. Thus, Dr. Pevner is the only remaining plaintiff's/appellee.

U.S.C. § 1961, adding $131,404.83 to the verdict already entered against Atlantic City.

The City now appeals the denial of the motion for new trial, the size of the remittitur that was granted, and the award of prejudgment interest to Dr. Pevner. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

## II. STANDARDS OF REVIEW

We begin by emphasizing the limited nature of our review and the broad discretion which we accord to the lower courts to decide motions for new trial, remittitur, and prejudgment interest. A trial judge is in the best position to weigh the evidence, evaluate the credibility of witnesses, and ultimately determine the propriety of a jury's verdict. Therefore, as we have consistently maintained, "the scope of this court's review of a damage award is exceedingly narrow. We may grant a new trial or remittitur only if the verdict is so grossly excessive as to shock the judicial conscience." *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1039 (3d Cir. 1987) (internal quotations omitted); *see also Gumbs v. Pueblo Intern, Inc.*, 823 F.2d 768, 771 (3d Cir. 1987) (stressing our "severely limited" role in reviewing a trial court's decisions on motions for new trial and remittitur). We may review a verdict to ensure that it is rational, *Williams*, 817 F.2d at 1038, but we will not disturb a district court ruling on the adequacy of damages "unless a 'manifest abuse of discretion' [is] shown." *Semper v. Santos*, 845 F.2d 1233, 1236 (3d Cir. 1988) (quoting *Edynak v. Atlantic Shipping Inc. CIE, Chambon Maclovia S.A.*, 562 F.2d 215, 225-26 (3d Cir. 1977)). Similarly, "we may disturb the district court's

determination with respect to a remittitur only for abuse of discretion," *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 206 (3d Cir. 1996) (quoting, *Gumbs*, 823 F.3d at 771), and our review of an award of prejudgment interest is, likewise, limited to abuse of discretion *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1002 (3d Cir. 1992).

In addition, two other considerations give us pause. First, where, as here, the district court has already granted remittitur, we must give "additional deference" to the judge's decision. *Delli Santi*, 88 F.3d at 206. As the First Circuit has written, when the damages awarded by the jury have already been subjected to thorough scrutiny by the trial court, "and the sum that the defendant will ultimately have to pay does not exceed the outermost total which . . . could fairly be said to flow from the evidence adduced at trial, the court of appeals has no warrant to insist upon a retrial or to reduce the award still further." *De Leon Lopez v. Corporacion Insular De Seguros*, 931 F.2d 116, 126 (1st Cir. 1991). To do otherwise would invade the province of the jury while undermining respect for the trial court.

Second, we are even more hesitant on appeal to reverse a factual determination regarding pain and suffering or emotional distress. "Evidence of pain and suffering is particularly ill-suited to review upon only a written record," *Edynak*, 562 F.2d at 227 n.16, for evaluations of witness credibility and demeanor are especially critical to determining the merits of a litigant's claims. Therefore, where, as in this case, the crux of the action involves emotional and psychological damages, we believe the ultimate decision should remain with the jury and the trial judge absent an abuse of discretion. *Kerzner*

*v. Global Upholstery Co., Ltd.*, No. CIV. A. 95-1209, 1997 WL 727692, at *1 (E.D. Pa. Nov. 19, 1997).

## III. DISCUSSION

With these principles in mind, we see no reason to upset the ruling of the lower court in the case at bar. The City's contention that the district court judge abused his discretion in ruling on the motions for new trial, remittitur, and prejudgment interest fail to demonstrate why we should invade the province of the jury and the trial court to alter the verdict that has been entered in Dr. Pevner's favor.

### A. The Motions for New Trial and Remittitur

The City begins by arguing that the district court abused its discretion in failing to grant a new trial on damages and/or to remit the jury's verdict to an amount bearing a rational relationship to the evidence. In particular, it contends (1) that the evidence did not support compensating Dr. Pevner for emotional distress; (2) that the evidence did not support awarding Dr. Pevner relief for lost income; and (3) that, even if Dr. Pevner was entitled to these damages, he should have received no more than the $363,180 in out-of-pocket damages which he substantiated at trial. For the reasons that follow, we disagree.

#### 1. *Emotional Distress Damages*

The City first contends that Dr. Pevner should not have received compensation for emotional distress

caused by the 1989-1991 prosecution, because the evidence of emotional distress damage was to speculative, and because Dr. Pevner failed to prove that his emotional distress was proximately caused by the City's violation of § 1983. Both parties acknowledge that the jury awarded damages based on evidence presented at trial of $363,130 of out-of-pocket special damages suffered by Dr. Pevner.[2] Of this total, $309,050, or nearly 85%, of Dr. Pevner's asserted losses were allegedly the product of the emotional and psychiatric distress caused by City's failed prosecution. However, the City maintains that the evidence presented at trial was too speculative to support a verdict for these emotional claims. *See, e.g., Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121 (3d Cir. 1988) (stating that "speculative damages will not be awarded" in civil rights cases). In addition, it argues that there is insufficient evidence of a causal link between the City's prosecution and any emotional damages that Dr. Pevner may have suffered.

We find, however, that the district court did not abuse its discretion by denying a new trial or granting a

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[2] The damages were calculated as follows:

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| Attorneys' fees for the state court prosecution: | $11,940 |
| Lost rental income from the properties in Atlantic City: | 42,140 |
| Medical/psychiatric bills: | 6,925 |
| Anticipated future psychiatric care: | 28,125 |
| Lost income from work (1989-1995): | 274,000 |
| TOTAL: | $363,130 |

larger remittitur on these grounds. First, there is ample evidence in the record from which a rational jury could have concluded that Dr. Pevner suffered emotional damages in the amount that he has claimed. Eleanor Pevnor ("Mrs. Pevner"), Dr. Pevner's wife, testified that Dr. Pevner became depressed, pessimistic, and socially inactive as a result of the municipal prosecution. (Joint Appendix ("JA") at 245.) Dr. Robert Zibelman ("Dr. Zibelman"), the psychiatrist who treated Dr. Pevner after the manifestation of his depression and anxiety, observed that Dr. Pevner was nervous and upset, had withdrawn from his friends, and had developed a dissociative amnestic disorder characterized by loss of contact in response to stress. (JA at 358-65.) He further noted that Dr. Pevner had experienced a "traumatic change in his whole life" that would require psychiatric care "for a number of years." (JA at 364, 367.) Additionally, Michael Lederer ("Mr. Lederer") and Martin Kwait ("Mr. Kwait"), two of Dr. Pevner's closest friends, stated under oath that Dr., Pevner had completely changed, "like Dr. Jekyll and Mr. Hyde," (JA at 493), into a confused individual who seemed out-of-touch with reality. (JA at 539.)

Thus, the jury's decision to award Dr., Pevner emotional damages was clearly within the bounds of reason. This court had been willing to reject a claim of emotional distress where there is insufficient evidence to support a rational verdict. *See, e.g., Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198 (3d Cir. 1986) (affirming a remittitur where plaintiff presented no testimony from her peers and no evidence of lost income or psychological

counseling). However, where, as here, there is uncontradicted testimony from the plaintiff, his wife, his psychiatrist, and his friends, all confirming the psychological and emotional changes in his life after the City's prosecution, we are in no position on appeal to declare that the district court abused its discretion by acting as it did. *See, e.g., Bolden v. Southeastern Pa. Transp. Auth.*, 21 F.3d 29 (3d Cir. 1994) (testimony of friends, family, and psychological damages sufficient to sustain the jury's award for emotional damages).

Likewise, we do not believe that the judge erred in finding that there was sufficient evidence of causation to support Dr., Pevner's emotional distress claims. In order to collect compensatory damages in a § 1983 action, a plaintiff must prove that a constitutional deprivation actually caused a tangible injury. *Carey v. Piphus*, 435 U.S. 247, 264 (1978). Here, the City argues that there was no causation because "the most significant and dramatic testimony regarding emotional distress involved events which occurred long after the City's § 1983 violations had ceased." (City Br. at 27.) Indeed, the testimony at trial established that Dr. Pevner's most palpable emotional reactions occurred in 1994, three years after the City's prosecution had ended. Dr., Pevner became more withdrawn after receipt of a May 17, 1994, letter from the City indicating that he was about to be prosecuted under the same unlawful ordinance for which he had been cleared (JA at 265); he had a bizarre emotional reaction after receiving additional letters from the City in August 1994 (JA at 277-79);[3] and he sought psychiatric assistance with

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[3] The City's contention that the district court improperly admitted evidence of Dr. Pevner's reactions to these 1994 letters

Dr. Zibelman for the first time in October 1994. (JA at 351.) Thus, the City claims, there is no evidence that the distress giving rise to Dr. Pevner's claim was caused by the City's prosecution, which had ended three years earlier in 1991.

However, the record does contain extensive evidence from which a reasonable jury could have found proximate causation. As the district court documented, "the unrebutted testimony at trial showed that [Dr. Pevner] continued to experience anxiety, depression, mental anguish and emotional distress *as a result of the prosecution* from 1989 through 1994" even though his charges with the City had been resolved by 1991. (JA at 113; emphasis added.) Mrs. Pevner, Mr. Lederer, Mr. Kwait, and Dr. Zibelman all stated under oath the Dr., Pevner's condition worsened from 1989 through 1994, and that his stress was caused by and directly related to the strain of the prosecution initiated by the City. (JA at 363.) Dr. Zibelman even testified that "there were *no* other stressors that I could determine that would cause these symptoms" other than the city's wrongful conduct. (JA at 379; emphasis added.) Therefore, a reasonable jury could have found that Dr., Pevner's emotional reaction in 1994 was not the result of any unrelated incident, or a distinct and

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is unavailing. The district court admitted the letters for the limited purpose of showing how the plaintiff perceived and reacted to then [sic], and expressly gave the jury a limiting instruction to this effect. (JA at 203-04.) The limiting instruction was stipulated by both counsel and was read to the jury several times. (JA at 223.) Thus, there is no reason to believe that these letters created the type of danger or prejudice that would have warranted their exclusion.

separate cause in and of itself, but was, rather, the manifestation of a chronic, underlying emotional disorder which had continued unabated since the City first charged Dr., Pevner with a violation of the zoning ordinance in 1989.[4]

2. *Lost Income Damages*

The City next contends that Dr. Pevner presented insufficient evidence to support his claim for damages from lost income. At trial, Dr. Pevner sought $274,000 in relief resulting from the loss of income from his dental practice, including $40,000 in lost income per year from the commencement of the City's prosecution in 1989 until he reached the age of sixty-five. The City, though, argues that while the money that Dr. Pevner sought for lost income presumed a total incapacity to work, the evidence showed that Dr. Pevner actually practiced dentistry on a limited basis after 1989. Therefore, it maintains that Dr. Pevner was not entitled to collect any damages for lost income because he was always capable of working.

We disagree. As the district court found, "[t]here was ample evidence at trial showing that [Dr. Pevner] would have earned $274,000 in income from his dental practice from 1989 to 1995, that he had no income from the dental

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[4] The City's argument that Dr. Pevner's reactions in 1994 were too irrational, and thus not compensable, are also without merit. On this record, a jury certainly could have found that Dr. Pevner would reasonably suffer emotional distress upon receipt of the City's letters, especially in light of the uncontradicted evidence showing that Dr. Pevner was suffering from continuous psychological traumas throughout the 1990's.

practice for the two years prior to trial, and that he would continue to have no income from the dental practice into the future." (JA at 1106 n.7.) Mrs. Pevner testified that her husband earned approximately $40,000 per year from his dental practice (JA at 292), but that "the dental practice really went down the tubes" after the City's prosecution, and that Dr. Pevner soon "showed no interest, no concern" and "didn't want to see new patients." (JA at 259.) Dr. Zibelman also stated under oath that Dr. Pevner "was no longer able to practice dentistry as he once had," and that he could not "practice what he was trained to do in terms of his profession." (JA at 354, 360.)

Moreover, merely because Dr. Pevner could perform some work on a limited basis does not mean that he should be denied compensation for lost wages. Both the jury and the judge below found that the evidence at trial demonstrated damages for lost income in the amount of $274,000, and it is not our duty to second-guess those findings by drawing our own conclusions as to the value of Dr. Pevner's business and the losses which he incurred. The record contains credible evidence supporting Dr. Pevner's claims, and thus we find that the lower court acted within its discretion in upholding that portion of the jury's verdict regarding lost income.

3. *Additional Compensatory Damages*

We also reject the City's contention that Dr. Pevner is entitled to no more than the $363,130 in the out-of-pocket damages which he claimed at trial. Although Dr. Pevner's actual losses amounted to $363,130, the final verdict, following Judge Rodriguez's remittitur, totaling $863,130.

The City argues that the extra $500,000 awarded to Dr. Pevner is unsustainable, because (1) these damages are intangible and were not directly supported by evidence at trial, and because (2) these damages represent an improper effort to impose punitive damages on the City. We find that both of these arguments lack merit.

In choosing to remit the jury's verdict to $863,130, the trial judge made clear that the award in this case represented "$363,130 for special damages and $500,000 for pain and suffering, emotional distress, humiliation, and harm to plaintiff's reputation." (JA at 1121.) Contrary to what the City contends, these intangible damages for pain and suffering, emotional distress, and reputational injury are clearly permitted. As the Supreme Court has written, the level of damages in § 1983 disputes is generally determined by principles derived from the common law of torts. *Carey*, 435 U.S. at 257-58. "To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.' " *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *see also Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 265 (3d Cir. 1995) (relief is available for "intangible injuries" in § 1983 cases). Therefore, although Dr. Pevner suffered only $363,100 in out-of-pocket losses, the district court did not abuse its discretion by awarding him an additional sum for emotional distress, humiliation, and other abstract harms. As long as there was sufficient evidence of intangible damages – and there was

(*see, e.g.*, JA at 1117) – Dr. Pevner was entitled to receive further compensation beyond his actual losses.[5]

Furthermore, nothing in the record supports the city's contention that the extra $500,000 in damages represented an improper attempt by the jury to impose punitive damages. As a general rule, § 1983 plaintiffs are not entitled to punitive damages against a municipality. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Here, the City argues that because the final award so greatly exceeded Dr. Pevner's out-of-pocket losses, "there is no other logical explanation for the jury's excessiveness than that it improperly sought to punish the City with the imposition of *de facto* punitive damages." (City Br. at 31.)

It is true that "the size of a jury's verdict may be so excessive as to be inherently indicative of passion or prejudice," *Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997) (quotation omitted), and in the present case, we agree that the jury awarded Dr. Pevner a considerable amount of damages to compensate him for intangible harms. Moreover, even though the trial judge granted the City's motion for a remittitur, the final verdict still provided Dr. Pevner with $500,000 in supplementary damages. Nevertheless, the mere size of this compensatory award does not lead us to conclude

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[5] The City's contention that Dr. Pevner's intangible damages were caused by this litigation, and not by the 1989-1991 prosecution, is unavailing. There is no evidence in the record from which a jury could conclude that Dr. Pevner's emotional distress was caused by the initiation of this lawsuit; rather, as noted above, the evidence amply supports the district court's finding that the City's prosecution was the sole cause of Dr. Pevner's harms. (JA at 379.) *See supra* page 9.

that the jury was necessarily making an improper attempt to impose punitive damages on the City. To the contrary, we believe that the record shows that the jury and the district court acted within the bounds of their discretion by finding that Dr. Pevner was entitled to a substantial award beyond the damages awarded for his actual losses.

The district court's "careful review of the evidence presented at trial," (JA at 1121), revealed that a reasonable jury could have provided Dr. Pevner with $500,000 in intangible relief. Dr. Pevner presented nine witnesses, none of which were rebutted, to show that he had sustained extensive pain and suffering since 1989. Those nine witnesses established, *inter alia*, that the City's prosecution caused Dr. Pevner severe emotional distress, (JA at 277-79), ruined his dental career and professional life, (JA at 259), and created the need for long-term psychological care and medical expenses.[6] (JA at 364-67.)

Therefore, we cannot say that the trial court erred by refusing to grant a new trial or by granting a remittitur to $863,130. It is not our task to determine whether the jury

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[6] Furthermore, the City's reliance on *Sanders v. City of Indianapolis*, 837 F.Supp. 959 (S.D. Ind. 1992), to show that this damage award is presumptively punitive is misplaced. *Sanders* was a limited holding, establishing only that under the particular facts of that case, the plaintiff's injuries did not warrant compensatory damages of more than $78,000. *Id.* at 968. The *Sanders* plaintiff presented no evidence of medical expenses, psychological treatment, or injury to reputation. *Id.* at 965-66. In contrast, Dr. Pevner presented unrefuted evidence of all three of these harms. Thus, the facts in the record here show that trial court did not abuse its discretion by permitting Dr. Pevner to collect considerable compensatory damages.

awarded the precise amount of damages that we believe were warranted; we must merely ask whether the trial judge abused his discretion in finding that the relief was not "so grossly excessive as to shock the judicial conscience." *Williams*, 817 F.2d at 1039. In light of the unrefuted testimony of the witnesses who testified on Dr. Pevner's behalf, we are confident that he did not.

**B. The Motion for Prejudgment Interest**

The City's final contention is that the district court erred in granting Dr. Pevner's motion for prejudgment interest. "[T]he availability of interest in an action arising under a federal statute is governed by federal law." *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274 (3d Cir. 1987), *abrogated on other grounds by Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 484 U.S. 827 (1990). Here, though, that federal law – § 1983 – provides no guidance as to whether prejudgment interest should be awarded. Thus, "[i]n the absence of an explicit congressional directive, the awarding of prejudgment interest under federal law is committed to the trial court's discretion." *Ambromovage v. United Mine Workers of Am.*, 726 F.2d 972, 981-82 (3d Cir. 1984); *see also Saverese v. Agriss*, 883 F.2d 1194, 1207 (3d Cir. 1989) (noting that prejudgment interest is committed to the discretion of the district court in federal question litigation).

In the case at bar, the district court exercised that discretion to award Dr. Pevner $131,404.83 in prejudgment interest pursuant to 28 U.S.C. § 1961. The City now argues that the trial judge committed reversible error by (1) failing to recognize that the jury must have included

prejudgment interest in its verdict, and by (2) finding that the equities favored awarding Dr. Pevner prejudgment interest.[7] Once again, we disagree.

The City begins by arguing that the size of the jury's general verdict "mandates the conclusion" that the jury considered prejudgment interest and factored it into its damage award. (City Br. at 41.) Therefore, it contends, the trial judge should not have given Dr. Pevner prejudgment interest because the jury had already done so.

It is true that we must caution against overcompensating litigants, because prejudgment interest is an equitable remedy, intended only to [sic] "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Kaiser Aluminum*, 494 U.S. at 835-36 (1990) (quoting *Poleto*, 826 F.2d at 1280); *see also Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 613 (2d Cir. 1994) (noting that the "courts must be careful that an award does not overcompensate a plaintiff"). However, it is also true that we are hesitant to reverse an award of prejudgment interest

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[7] The City's third contention, that the district court improperly awarded Dr. Pevner prejudgment interest for his state tort claims, is meritless. The district court specifically noted that it was awarding prejudgment interest under *federal* law (§ 1983), not state law, and it refused to "determine whether prejudgment interest is available under New Jersey law," because Dr. Pevner had elected to receive interest under federal law alone. *See* JA at 1126 n.1. Accordingly, there is not even an issue as to whether Dr. Pevner was entitled to prejudgment interest for the City's violations of state law.

absent specific evidence of an abuse of discretion. *Anthuis*, 971 F.2d at 1002.

Here, we have found no specific evidence that would support the City's assertion of overcompensation and we are thus given no rationale for upsetting the decision below. The record does not demonstrate that the jury considered prejudgment interest in its verdict, but, instead, indicates that the district court instructed the jury on the particular elements of compensatory damages, without mentioning delay damages or prejudgment interest at all. (JA at 792-99.) In addition, the City points to no evidence and provides no reason, beyond mere speculation, to show how size of the verdict was a product of the jury's effort to compensate Dr. Pevner for his delay in obtaining relief. Therefore, where the trial judge saw fit to award prejudgment interest to fully compensate the plaintiff, we will not disturb that ruling by reading facts into the record that do not exist.

We are equally unpersuaded by the City's contention that prejudgment interest was not warranted by the balance of the equities in this case. A district court is to consider four factors in deciding whether an award of prejudgment interest would be equitable, including: (1) whether the claimant has been less than diligent in prosecuting the action; (2) whether the defendant has been unjustly enriched; (3) whether an award would be compensatory; and (4) whether countervailing equitable considerations militate against a surcharge. *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 540 (3d Cir. 1983). On appeal, the City takes issue with only one of these four factors, claiming that it was not unjustly enriched by

prosecuting Dr. Pevner, and that prejudgment interest was thus improperly awarded.

We agree that the district court erred in applying the test for unjust enrichment. The district court adopted *Feather's* definition of unjust enrichment, which reads: "To the extent defendant has had the free use of the income-producing ability of plaintiffs' money without having to pay for it, he has been unjustly enriched." *Id.* (quoting *Recent Developments – Prejudgment Interest as Damages: New Application of an Old Theory,* 15 Stan. L. Rev. 107, 109 (1962)); (JA at 1127). The court then concluded that "the City has been unjustly enriched to the extent that it has had use of the money that rightfully belonged to the plaintiff as compensation for the deprivation of his constitutional rights." (JA at 1127.) Yet this reasoning has no limits; *every* defendant which loses a lawsuit for money damages "has had use of the money" that it now owes to the plaintiff as compensation. Thus, under the district court's reasoning, *every* losing defendant would be considered unjustly enriched for purposes of determining the appropriateness of prejudgment interest. Obviously, *Feather* requires more than that. A defendant must profit in some way, or must gain financially in some manner, at the expense of the plaintiff to be considered unjustly enriched. The mere fact that the defendant now owes money to the plaintiff in damages is not enough.

With this in mind, it is evident that the City was not unjustly enriched. Atlantic City collected no fees or dues from Dr. Pevner; it had no employment relationship with Dr. Pevner which involved salary payments or benefits; and there is no indication that it benefitted financially from prosecuting Dr. Pevner or Mr. McGrath. In fact, had

the City acted lawfully and not enforced the statute, it would be in the exact same financial position as it finds itself now (excluding the costs of this litigation).

Nevertheless, the fact that the City was not unjustly enriched does not, without more, compel us to reverse the district court's Order granting the motion for prejudgment interest. *See Rolf v. Blyth Eastman Dillon & Co.*, 637 F.2d 77, 87 (2d Cir. 1980) (holding that "the fact that the defendants were not unjustly enriched does not, standing alone, make it inequitable to compel them to pay interest"). Unjust enrichment is one of only four factors in the *Feather* test, and the district court determined that the remaining three elements all weigh in favor of awarding prejudgment interest in this case. (JA at 1127-28.) It specifically found that plaintiff was diligent in prosecuting this action and that other equitable considerations, including the City's resistance to settlement negotiations, warranted additional damages to fully compensate the plaintiff. (JA at 1127-28.) In particular, it noted that although Dr. Pevner commenced this action on May 27, 1993, the City's first settlement offer was not made until the first day of trial in March 1996. (JA at 1128.) Thus, as the district court wrote, "[h]aving made the decision not to engage in pretrial settlement negotiations, the City of Atlantic City will not now be heard to complain that the plaintiff is not entitled to compensation for the lost use of the funds during that period." (JA at 1128.) We see no reason to disturb this reasoning, and we therefore hold that the lower court acted within its discretion in finding that, on balance, the equities militate in favor of an award of prejudgment interest.

IV.

The district court did not abuse its discretion in ruling on the motions for new trial, remittitur, and pre-judgment interest. Accordingly, the lower court's Order dated May 12, 1997, and its Letter Opinion dated May 30, 1997, will be AFFIRMED.

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TO THE CLERK OF THE COURT:

Please file the foregoing Memorandum Opinion.

/s/ Marjorie O. Rendell, J.
Marjorie O. Rendell, J.

Dated: FEB 9 1998

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 97-5405

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MILTON PEVNER

v.

CITY OF ALTANTIC CITY,

Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 93-cv-02295)

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Present: Scirica, Roth, and Rendell, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on January 29, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 6, 1997, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk

Clerk

Dated: February 9, 1998

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